No. _____

In the Supreme Court of the United States

STAFF SERGEANT LINWOOD W. BURTON, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner's right to Due Process was violated when the trial judge permitted the triers-of-fact to consider evidence of a charged sexual assault, not offered under Military Rule of Evidence (MIL. R. EVID.) 413, as propensity evidence that Petitioner raped a different woman approximately four years later?

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The Petitioner, Staff Sergeant Linwood W. Burton, Jr., respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on January 15, 2009.

OPINIONS BELOW

The order of the United States Court of Appeals for the Armed Forces, *United States v. Burton,* 67 M.J. 150 (C.A.A.F. 2009) is located at Appendix (App.) 1a. The order of the United States Air Force Court of Criminal Appeals, *United States v. Burton,* ACM 36296 (2007 CCA Lexis 281 (A.F. Ct. Crim. 16 July 2007)) (unpub. op.) is located at App. 21a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces ("CAAF") was entered on January 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (2000) and 10 U.S.C. § 867a(a) (2000).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

FED. R. EVID. 413 and FED. R. EVID. 414 are located at App. 37a and 38a, respectively.

MIL. R. EVID. 401, MIL. R. EVID. 402, and MIL. R. EVID. 403 are located at App. 39a. MIL. R. EVID. 404 is located at App. 40a.

MIL. R. EVID. 413 and MIL. R. EVID. 414 are located at App. 41a and 42a, respectively.

STATEMENT OF THE CASE

On February 9-12, 2005, Petitioner, an active duty non-commissioned officer in the U.S. Air Force, was tried at a general court-martial at Yokota Air Base, Japan, before a panel consisting of officer and enlisted members. Petitioner was charged with attempted rape, forcible sodomy, and indecent assault on an adult civilian female, SS, in Venice, Italy, in September 2000 and with raping Senior Airman (SrA) DH, an Air Force servicemember, in Japan in February 2004. At no time before or during trial did the prosecution provide either Petitioner or the court with notice of its intent to argue that evidence of the alleged sexual assault in Italy was proof that Appellant had a propensity to sexually assault women in support of its proving the alleged rape in Japan. The government's case-in-chief, as to both charges, relied on the testimony of the two women.

Prior to deliberations on the merits, the military judge gave the following spill-over instruction:

> An Accused may be convicted based only on the evidence before the court. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

Record 360.

During argument, the prosecution told the court-martial's members they had "the rare opportunity to take two allegations of sexual assault . . . and lay them side-by-side and compare them." Record 363. The prosecutor urged the members to "take both of their stories and lay them next to each other and compare them and see what this particular person's M.O. is. How he goes about committing sexual assault. It will also show you that he has propensity to engage in this sort of conduct." Record 374.

He continued with the following:

> I've got a list here. . . . Now, before I get to them I want to preface-- this was something the judge told you, I don't intend for you to take proof of one offense to find him guilty of another, the judge told you that you can't do that. But what you can do is you can take these things and compare them for his propensity to commit these types of offenses. That's perfectly acceptable when you're deliberating.

Record 374-75.

Petitioner's defense counsel did not object to the prosecutor's argument or request the court to provide a limiting instruction on the prosecution's reference to propensity. Nor did the military judge give such an instruction *sua sponte*. Petitioner was acquitted of the attempted rape, forcible sodomy, and indecent assault of SS but was found guilty of consensual sodomy and indecent acts with SS. He was also found guilty of raping DH. Petitioner was sentenced to a reduction in rank to the grade of E-1, to forfeiture of all pay and allowances, to eight years of confinement, and to a dishonorable discharge. The convening authority dismissed the findings of guilt as to the consensual sodomy and indecent acts

with SS, and reduced the adjudged confinement to seven years.

The Air Force Court of Criminal Appeals affirmed Petitioner's findings and sentence, finding that the trial counsel's argument was proper under MIL. R. EVID. 413. *Id.* at 31a, 36a. The Court of Appeals for the Armed Forces granted review. *Id.*, at 2a. That court also affirmed, but on a different basis, finding that MIL. R. EVID. 413 was not relevant because the evidence as to the earlier sexual assault was offered as primary proof of charged offenses, not under MIL. R. EVID. 413. *Id.* at 7a, 10a-11a. The lower court found that the prosecution's argument was improper but did not rise to the level of plain error. *Id.* at 10a. Chief Judge Effron concurred in part and in the result, agreeing that the trial counsel's argument was improper and stating that the military judge should have supplemented his "generic spillover instruction" with a tailored instruction on the issue of propensity; however, he found the omission of an instruction did not rise to the level of plain error. *Id.* at 11a, 15a-16a. In a separate opinion, Judge Erdmann agreed that the prosecution erroneously argued propensity but concluded that the military judge committed plain and obvious error when he failed to give a tailored propensity instruction. *Id.* at 16a, 19a-20a.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether the introduction of the limited use of propensity evidence by Federal Rule of Evidence (FED. R. EVID.) 413 and MIL. R. EVID. 413 has diminished a defendant's longstanding right under the Due Process Clause to have his trier-of-fact determine his guilt without resorting to a spillover effect from unrelated charges. *Id.* at 37a, 41a. Despite MIL. R. EVID. 404's limitations on the introduction of evidence to show conformity therewith,[1] relatively recent evidentiary rules such as MIL. R. EVID. 413 and FED. R. EVID. 413 allow prosecutors to offer (and by extension, argue) propensity evidence if a trial judge has first found the proffered evidence relevant and performed a detailed MIL. R. EVID. 403 balancing test.[2] With this loosening of restrictions against using evidence to show propensity, this case raises whether the Due Process Clause provides a defendant protection against spillover from unrelated charges where the

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[1] MIL. R. EVID. 404 generally excludes admission of a person's character or a trait of character for the purpose of proving action in conformity therewith. App. 40a.

[2] Where sexual assault offenses have been charged, MIL. R. EVID. 413 and its civilian counterpart, FED. R. EVID. 413, permit the admission of evidence of the accused's commission of other sexual assault offenses to show propensity. App. at 37a, 41a. Similarly, MIL. R. EVID. 414 and the parallel FED. R. EVID. 414 permit admission of evidence of similar offenses in child molestation cases. App. at 38a, 42a. *See United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000)(before admitting evidence under MIL. R. EVID. 413, the court must find the evidence relevant under MIL. R. EVID 401 and 402 and perform a MIL. R. EVID 403 balancing test).

trial court failed to safeguard against unfair prejudice with a propensity instruction. This question is relevant to prosecutions in federal court and especially important to the military justice system, where, unlike the federal criminal practice, joinder of offenses is the norm and severance motions are disfavored. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601(e)(2) discussion (2005) (commanders are encouraged to refer all known charges to a single court-martial); *United States v. Haye,* 29 M.J. 213, 215 (C.M.A. 1989) (noting that severance motions have been historically frowned upon). This Honorable Court should, therefore, settle this timely constitutional question by granting this petition.

I. Traditionally, the common law, concerned with the risk of unfair prejudice, prohibited introducing evidence of bad acts to show propensity.

This Court has stated that "our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff,* 518 U.S. 37, 43 (1996). By this standard, the traditional ban on prior bad acts to show propensity demonstrates the common law's acknowledgement of the risk of unfair prejudice inherent in propensity evidence. Traditionally, the common law has disallowed evidence of a defendant's prior wrongful acts to establish a probability of his guilt. Early American courts

retained the English rule of excluding evidence of prior bad acts as character evidence to show action in conformity therewith. *See McKinney v. Rees,* 993 F.2d 1378, 1380-81 (9th Cir. 1993) (citing *Hampden's Trial,* 9 How. St. Tr. 1053, 1103 (K.B. 1684) and *Rex v. Doaks,* Quincy's Mass. Reports 90 (Mass. Super. Ct. 1763)).

Regarding propensity evidence, this Court noted that "the inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny [a defendant] a fair opportunity to defend against a particular charge." *Michelson v. United States,* 335 U.S. 469, 475-76 (1948).

Moreover, where unrelated offenses are charged at one trial, as is the usual practice in the military, the "possibility is very real that juries will use the evidence of one of the crimes charged to infer a criminal disposition on the part of the accused in regard to other crime(s) charged." *United States. v. Myers,* 51 M.J. 570, 579 (N.M. Ct. Crim. App. 1999).

Given the powerful nature of propensity evidence, the Military Rules of Evidence permit evidence of other prior wrongful acts to show propensity in the very limited circumstances provided by MIL. R. EVID. 413 and MIL. R. EVID. 414 involving charged sexual assault and child molestation cases, respectively.

Even then, courts have required certain safeguards, such as a MIL. R. EVID 403 balancing test, to protect defendants from the dangers of unfair prejudice inherent to propensity evidence.

II. In light of the dangers of unfair prejudice and spillover when evidence of unrelated charged conduct is argued to show propensity, the trial judge violated Petitoner's Due Process Rights by failing to provide a tailored propensity instruction.

All five of the judges at the Court of Appeals for the Armed Forces agreed that the trial counsel's propensity argument was improper. The military judge's failure to instruct the panel to disregard that portion of the trial counsel's argument or that the panel could not consider proof of unrelated charges as propensity evidence left the panel believing that during deliberations, they could indeed consider evidence from the charges originating in Italy in 2000 as proof that Petitioner had the propensity to rape a female servicemember in Japan almost four years later. Moreover, the judge gave the panel no guidance on how to consider the prosecutor's propensity argument or its conflict with the judge's spillover instruction.

A. Where a propensity argument is appropriate under MIL. R. EVID. 413, courts have imposed a *sua sponte* duty to instruct members regarding the consideration of propensity evidence.

Even where evidence of other sexual assaults is properly admitted under MIL. R. EVID. 413 to show propensity to commit a charged sexual assault, military courts have recognized the imperative of appropriate propensity instructions. For example, the United States Army Court of Criminal Appeals has ruled that trial judges have a limited *sua sponte* duty to provide members guidance where evidence of other sexual assaults is admitted under MIL. R. EVID. 413 to show propensity to commit a charged sexual assault. *United States v. DaCosta*, 63 M.J. 575, 582-83 (A. Ct. Crim. App. 2006) ("we place a limited *sua sponte* duty on military judges when MIL. R. EVID. 413 evidence is admitted. Without guidance regarding the proper use of 413 evidence of other sexual assaults, panel members would be left to guess how that evidence should impact their decision . . . .").

Moreover, the Court of Appeals for the Armed Forces ("CAAF") has acknowledged that procedural safeguards under MIL. R. EVID. 413 require "proper instructions." *United States v. Schroder*, 65 M.J. 49, 55 (C.A.A.F. 2007). That court held that where the members are instructed that MIL. R. EVID. 414 evidence may be considered for an accused's propensity to commit the charged child molestation

offense, the panel "must also be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged" and that the fact-finder "may not convict on the basis of propensity evidence alone."[3] *Schroder,* 65 M.J. at 56.

Although the prosecutor did not introduce evidence of the sexual assault offense against SS under MIL. R. EVID. 413, he, nonetheless, argued that evidence of other sexual assault offenses against SS showed Petitioner had a propensity to commit the charged sexual assault of DH. In accordance with *Schroeder* and *DaCosta,* the trial judge should have *sua sponte* instructed on propensity. Even though Petitioner's trial defense counsel did not request a propensity instruction, the trial judge, who is more than a mere referee and is required to assure that the accused receives a fair trial, must bear the primary responsibility for ensuring that the jury was properly instructed. *United States v. Graves,* 1 M.J. 50, 53 (C.M.A. 1975).

Both Chief Judge Effron and Judge Erdmann recognized that the prosecutor's propensity

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[3] MIL. R. EVID. 414, like MIL. R. EVID. 413, permits the introduction of evidence of similar offenses to show propensity to commit a charged offense. Specifically, where an accused is charged with an offense of child molestation, MIL. R. EVID. 414 allows evidence of the accused's commission of other offenses of child molestation to be admitted to show propensity. App. at 42a. MIL. R. EVID. 414 also has a civilian counterpart, FED. R. EVID. 414, which permits the admission of propensity evidence. App. 38a.

argument undercut the spillover instruction. App. at 14a-15a, 18a. The generic spillover instruction, which was provided to the members before the trial counsel's argument, did not compensate for this shortcoming because the panel members were left with an erroneous statement of the law by the prosecution.

B. In light of the prosecutor's improper propensity argument, the trial judge's failure to *sua sponte* instruct on propensity violated Petitioner's Due Process rights.

To ensure that the prosecution was held to its proper burden of proof for the charged rape of DH, the trial judge should have given *sua sponte* a propensity instruction when the prosecutor told the members they could use evidence of an unrelated charged offense to prove Petitioner's propensity to rape DH. As this Court noted, "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

A trial judge's failure to *sua sponte* give a tailored propensity instruction where an unrelated charge was improperly argued to show propensity unacceptably increased the likelihood the members convicted Petitioner of raping DH on a lesser

standard then direct evidence of each element of the charged rape beyond a reasonable doubt. As Judge Erdmann noted, the members lacked guidelines on reconciling the conflict between the military judge's instruction and the prosecutor's argument that the instruction could be ignored. App. at 19a. Under these circumstances with risks of spillover from the joinder of offenses and unfair prejudice from an improper propensity argument, the judge's failure to *sua sponte* give a propensity instruction violated Petitioner's Due Process rights.

Once it is determined that a specific instruction is required but not given, the test for determining whether this constitutional error was harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, (1967). Since the trial judge did not give the members any guidance on the prosecutor's argument to consider propensity, there is no confidence that Petitioner was convicted on direct evidence of the charged rape beyond a reasonable doubt rather than from unfair prejudice or on another inappropriate basis. The trial judge's failure to provide *sua sponte* a propensity instruction was plain, obvious, and constitutional error.

In finding that there was no plain error, CAAF did not adequately appreciate the underlying dangers of unfair prejudice and spillover from joinder of offenses which preexisted the trial judge's error. The generic spillover instruction did not cure this prejudicial environment, which formed the

context of this trial. Once the prosecutor made an improper propensity argument and statements conflicting with the judge's spillover instruction, the trial judge's failure to *sua sponte* instruct the members on propensity irretrievably tipped the balance, offending the "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Dowling v. United States*, 493 U.S. 342, 353 (1990). CAAF's ruling was, therefore, erroneous.

CONCLUSION

The Court of Appeals for the Armed Forces erred when it concluded that the trial judge's failure to *sua sponte* instruct on propensity did not constitute plain error where the prosecutor had argued propensity. This Court's issuance of a writ of certiorari will restore a defendant's long-standing right under the Due Process Clause to have his trier-of-fact determine his guilt without resorting to a spillover effect from unrelated charges. This issue is particularly significant to the military justice system, but is relevant to other federal courts as well. For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee

v.

Linwood W. BURTON Jr., Staff Sergeant, U.S. Air Force, Appellant

No. 07-0848
67 M.J. 150

October 15, 2008, Argued
January 15, 2009, Decided

RYAN, J., delivered the opinion of the Court, in which BAKER and STUCKY, JJ., joined. EFFRON, C.J., filed a separate opinion concurring in part and in the result. ERDMANN, J., filed a separate opinion concurring in part and dissenting in part.

OPINION BY: RYAN

Judge RYAN delivered the opinion of the Court.

At different points during the closing argument

on findings in this case, the trial counsel suggested that the members of the panel could compare the similarities between charged offenses for a propensity to commit "these types of offenses" and see the accused's modus operandi. Although the charged offenses were themselves the proper subject of closing argument, the underlying conduct had not been offered or admitted under Military Rules of Evidence (M.R.E) 404 or 413. Trial counsel's invitation to the panel to compare the charged offenses to find modus operandi or propensity was improper, but under the facts of this case the military judge's failure to *sua sponte* instruct the panel on the use of propensity evidence or take other remedial action did not constitute plain error. The decision of the United States Air Force Court of Criminal Appeals (CCA) is affirmed.[1]

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[1] On Appellant's petition, we granted review of the following issues:

I. WHETHER THE TRIAL COUNSEL ENGAGED IN IMPROPER ARGUMENT WHEN HE ARGUED THAT APPELLANT DEMONSTRATED A PROPENSITY TO ENGAGE IN SEXUAL ASSAULT.

II. ASSUMING, ARGUENDO, THAT IT WAS NOT IMPROPER FOR TRIAL COUNSEL TO ARGUE THAT APPELLANT HAD THE PROPENSITY TO COMMIT SEXUAL ASSAULTS, WHETHER THE MILITARY JUDGE ERRED BY FAILING TO GIVE AN ADDITIONAL INSTRUCTION ON THE USE OF PROPENSITY EVIDENCE.

I. Facts

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of rape, sodomy,[2] and indecent acts,[3] in violation of Articles 120, 125, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 925, 934 (2000). The sentence adjudged by the court-martial included a dishonorable discharge, confinement for eight years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority disapproved the findings of guilt as to sodomy and indecent acts, approved the findings of guilt as to rape, and approved the sentence as adjudged with the exception of confinement in excess of seven years. The CCA affirmed. *United States v. Burton*, No. ACM 36296, 2007 CCA LEXIS 281 (A.F. Ct. Crim. App. July 16, 2007)(unpublished).

Appellant's convictions arose from two distinct incidents, which were separated by several years. The Government charged Appellant with the forcible sodomy, indecent assault, and attempted rape of SS, a U.S. civilian he met while on leave in Venice, Italy, in 2000.[4] In addition, the Government charged

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[2] Appellant was charged with forcible sodomy in violation of Article 125, UCMJ, but found guilty of the lesser included offense of sodomy.

[3] Appellant was charged with indecent assault in violation of Article 134, UCMJ, but found guilty of the lesser included offense of indecent acts.

[4] Appellant was found not guilty of the attempted rape charge.

Appellant with the rape of Senior Airman DH, while both were stationed at Yokota Airbase, Japan, in 2004.

As is customary in the military justice system, the convening authority referred all of the charges related to these incidents to one court-martial. *See* Rule for Courts-Martial (R.C.M.) 307(c)(4); *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995) (recognizing the general policy of joining all possible charges into a single court-martial). Appellant did not move to have the charges severed. *See* R.C.M. 906(b)(10) (allowing a motion to sever offenses to prevent manifest injustice). Following the presentation of evidence by the prosecution and defense, the military judge instructed the panel, warning that counsel's closing arguments were not evidence and that belief of guilt of one offense could not be used as a basis for finding guilt of another offense -- a standard "spillover" instruction.

In the closing arguments that followed, the trial counsel noted the military judge's instruction that panel members could not use guilt of one offense as proof of guilt of another offense. However, trial counsel told the panel it could "take these things and compare them for [Appellant's] propensity to commit these types of offenses." He invited the panel to "take both of [the victims'] stories and lay them next to each other and compare them and see what this particular person's M.O. is." Further, trial counsel highlighted several similarities from the two incidents, including Appellant's particular actions and the victims' physical appearance and

vulnerability. Defense counsel neither objected to trial counsel's statements nor requested further instructions from the military judge.

II. Discussion

When no objection is made during the trial, a counsel's arguments are reviewed for plain error. *United States v. Schroder*, 65 M.J. 49, 57-58 (C.A.A.F. 2007). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). We agree with Appellant that trial counsel's closing argument was improper, but disagree that the error was plain and obvious such that the military judge was required to *sua sponte* give further instructions or take other remedial measures.

Counsel should limit their arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). In the instant case, evidence of the charged offenses was properly admitted and a fair subject of argument. The wrinkle is that trial counsel went further and encouraged panel members to compare the similarities of two charged offenses, pointed out several specific examples, and argued that these similarities showed Appellant's propensity to commit such crimes.

Our cases affirm the principle that an accused may not be convicted of a crime based on a general criminal disposition. *See, e.g., United States v. Hogan*, 20 M.J. 71, 73 (C.M.A. 1985) ("[A]n accused must be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition."); *see also* M.R.E. 404(a), (b) (generally prohibiting the use of evidence of character or past crimes to prove an accused acted in conformity therewith). The Government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as M.R.E. 404 or 413.[5] *See United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000) (noting M.R.E. 413 "creates an exception to Rule 404(b)'s general prohibition against the use of a defendant's propensity to commit crimes"). It follows, therefore, that portions of a closing argument encouraging a panel to focus on such similarities to show modus operandi and propensity, when made outside the ambit of these exceptions, is not a "reasonable inference[ ] fairly derived" from the evidence, and was improper argument. *Baer*, 53 M.J. at 237.

The CCA held that trial counsel's argument was proper based on M.R.E. 413. The CCA noted that the

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[5] *See, e.g.*, M.R.E. 404(a)(1), (2) (allowing character evidence when offered first by the accused); M.R.E. 404(b) (allowing evidence of other crimes to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake); M.R.E. 413 (allowing evidence of prior sexual assaults when the accused is charged with a sexual assault offense).

evidence of Appellant's alleged assaults and attempted rape of SS in 2000, as sexual assault offenses that occurred prior to the 2004 rape of SrA DH, could have been introduced as propensity evidence under M.R.E. 413. *Burton*, No. 36296, 2007 CCA LEXIS at 13.

The problem with the CCA's holding is simple -- this is not an M.R.E. 413 case. The evidence on which trial counsel was commenting was primary proof of the charged offenses. No evidence was introduced as propensity evidence pursuant to M.R.E. 413, and none of the procedural safeguards required as a predicate to such introduction were followed. *See Schroder*, 65 M.J. at 55 (requiring the military judge to make relevance and prejudice determinations under M.R.E. 401, 402, and 403 before admitting propensity evidence); *Wright*, 53 M.J. at 482-83 (same). It was trial counsel's improper argument that introduced the issue of propensity, not the evidence. As the Government did not offer the evidence under M.R.E. 413, it did not follow the steps required by M.R.E. 413. Therefore, it may not *a posteriori* justify its closing argument based on what it might have done.

Determining that trial counsel's argument was improper, however, does not answer the question whether it was plain and obvious in the context of the entire trial that the military judge needed to *sua sponte* give further instructions on the use of propensity evidence. *See United States v. Young*, 470 U.S. 1, 16, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) ("[W]hen addressing plain error, a reviewing court

cannot properly evaluate a case except by viewing such a claim against the entire record."). An error is not "plain and obvious" if, in the context of the entire trial, the accused fails to show the military judge should be "faulted for taking no action" even without an objection. *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008). The relevant context includes the evidence presented at trial and the instructions given by the military judge. *See Darden v. Wainwright*, 477 U.S. 168, 182, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

It was not plain and obvious under the facts of this case that the military judge should have *sua sponte* given a propensity instruction, as Appellant now contends. First, as noted above, the evidence of each distinct offense was properly admitted and the fair subject of argument, but this was not an M.R.E. 413 propensity evidence case. The prosecution did not attempt to offer evidence or get a ruling from the military judge under M.R.E. 413 concerning propensity evidence. Moreover, the "similar" conduct was charged and presented as two separate offenses: the majority of the evidence introduced by the prosecution consisted of the testimony of two independent victims, and at no time during the presentation of the evidence did the prosecution compare the two charges or conflate the evidence. *Cf. United States v. Haye*, 29 M.J. 213, 214-15 (C.M.A. 1989) (finding error where the factual presentation of the case made it impossible for a panel to separate one specification from another). Appellant has made no suggestion that the evidence of each charge was

"so merged into one that it [was] difficult to distinguish." *Id.* at 215.

Next, after the close of the presentation of evidence, the military judge specifically instructed the panel as follows:

> An Accused may be convicted based only on evidence before the court. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

Although portions of trial counsel's closing argument arguably conflicted with this instruction, trial counsel specifically referenced the instruction and stated he did not "intend for [the panel] to take proof of one offense to find [Appellant] guilty of another." The real risk presented by trial counsel's improper argument was that it would invite members to convict appellant based on a criminal predisposition, not that members would now perceive properly admitted direct evidence of charged conduct as propensity evidence. This greater

risk was properly addressed by the military judge's spillover instruction. The military judge having instructed the panel that counsel's arguments were not evidence and given a general spillover instruction, it was not plain and obvious that an additional instruction was wanted or needed. *See United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000) (noting that panel members are presumed to follow a military judge's instructions and holding that any error from improper argument was cured by appropriate instruction); *Hogan*, 20 M.J. at 73 (suggesting that a clear instruction not to merge evidence substantially diminishes the chance of improper spillover).

In the context of the entire trial, including the distinct and clearly defined evidence against Appellant on similar yet separate offenses, the specific instructions to the panel, the fact that neither trial nor defense counsel offered M.R.E. 413 propensity evidence or requested a propensity instruction, and the fact that the comments of trial counsel were not so egregious as to provoke an objection by trial defense counsel, we do not believe that any error in trial counsel's argument rose to the level of plain error that would require the military judge to *sua sponte* instruct on the proper use of propensity evidence or take other remedial measures. *See Young*, 470 U.S. at 16, 20, 105 S.Ct. 1038 (noting "it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation," and holding that argument by counsel,

though improper, was not plain error warranting overturning the appellant's conviction).

III. Conclusion

For the reasons expressed above, we disagree with the reasoning of the Air Force Court of Criminal Appeals, but find no plain error in the court-martial. The decision of the Air Force Court of Criminal Appeals is affirmed.

EFFRON, Chief Judge (concurring in part and in the result):

I agree with the majority opinion that trial counsel erred in urging the members to consider the two charged offenses as propensity evidence. For the reasons set forth below, I would conclude that the generic spillover instruction given by the military judge should have been supplemented by a tailored instruction on the issue of propensity. I agree that this case may be affirmed because the instructional error was not prejudicial under Article 59(a), 10 U.S.C. § 859(a) (2000).

The prosecution's improper propensity argument

Appellant's court-martial involved two distinct allegations of sexual misconduct -- the first charged as occurring in 2000 and the second charged as occurring in 2004. The prosecution introduced evidence related to each incident at the court-

martial, and the admissibility of such evidence is not the subject of the present appeal.

The issues on appeal pertain to the comments made in trial counsel's closing argument, in which counsel asked the court-martial panel to "compare" the different charges for the purpose of assessing Appellant's "propensity to commit these types of offenses" and his modus operandi. As noted in the majority opinion, the prosecution may not ask the panel to conclude that an accused is guilty of one offense by citing similarities to another distinct offense unless: (1) the argument involves permissible use of the evidence, such as under an exception provided by Military Rule of Evidence (M.R.E.) 404 ("Character evidence not admissible to prove conduct; exceptions; other crimes") or M.R.E. 413 ("Evidence of similar crimes in sexual assault cases"); and (2) the military judge has analyzed and approved the use of the evidence in that manner under the applicable safeguards. *United States v. Burton*, 67 M.J. at 152-53 (C.A.A.F. 2009).

In the Court of Criminal Appeals, Appellant contended that trial counsel improperly asked the court-martial panel to view the distinct offenses as evidence of Appellant's propensity to engage in sexual assault. After noting that the defense had not objected to the prosecution's argument at trial, the Court of Criminal Appeals reviewed the contention under a plain error standard. See *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998) (holding that plain error review entails consideration of: (1) whether there was error; (2) whether the error was

plain or obvious; and (3) whether the error materially prejudiced the substantial rights of the accused); Article 59(a), 10 U.S.C. § 859(a) (2000).

The Court of Criminal Appeals concluded that there was no error because the use of propensity evidence is permissible under M.R.E. 413 in a sexual assault case. As noted in the majority opinion, one problem with reliance on M.R.E. 413 in this case is that the prosecution at trial did not follow the required steps for use of propensity evidence under M.R.E. 413. *Burton*, 67 M.J. at 153. Of particular note, the prosecution offered its propensity argument before the military judge could make the requisite determinations as to relevance and prejudice under M.R.E. 401, M.R.E. 402, and M.R.E. 403. *See Burton*, 67 M.J. at 153. A further problem is that even if the evidence had been properly approved as propensity evidence, the military judge did not provide the panel with an appropriate limiting instruction tailored to the issue of propensity. *See United States v. Schroder*, 65 M.J. 49, 56 (C.A.A.F. 2007).

The majority opinion concludes that trial counsel's error did not meet the second prong of the plain error test because, in the context of the full trial, it was not plain or obvious that the military judge should have given a propensity instruction. *See Burton,* 67 M.J. at 153. In that regard, the majority opinion notes that the evidence at issue was admitted properly on the distinct offenses, the prosecution did not conflate the separate offenses during the factual presentation of the evidence, the

evidence was not offered as propensity evidence under M.R.E. 413, and the military judge provided the members with an appropriate spillover instruction. *Id.* at 153-54. Although these considerations bear on the third aspect of the plain error test -- whether any error by the military judge materially prejudiced the substantial rights of the accused -- they are not determinative on the question of whether the military judge properly instructed the members in this case.

The prosecution improperly argued that although the members could not "take proof of one offense to find [Appellant] guilty of another," they could "take these [charges] and compare them for his propensity to commit these types of offenses." Without a ruling by the military judge on relevance and prejudice under M.R.E. 401, M.R.E. 402, and M.R.E. 403, trial counsel's propensity argument was not permissible under M.R.E. 413, either directly or by analogy. Moreover, the propensity argument did not fit into any of the exceptions for character evidence under M.R.E. 404.

Trial counsel's argument not only raised the subject of propensity without the appropriate predicate ruling by the military judge, but also placed the import of the military judge's spillover instruction at issue by suggesting that the spillover instruction did not apply to propensity evidence. Irrespective of whether the propensity argument was permissible under M.R.E. 413 or impermissible under M.R.E. 404, the military judge was required to

give an appropriate tailored instruction expressly addressing the subject of propensity. *See Schroder*, 65 M.J. at 56 (stating, in a case where evidence could be used to show propensity under the parallel propensity provisions of M.R.E. 414, that the court-martial panel "must also be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged" and that "the fact finder may not convict on the basis of propensity evidence alone"); *United States v. Levitt*, 35 M.J. 114, 120 (C.M.A. 1992) (stating, in a case where the evidence could not be used to show propensity, that "the instruction must expressly bar use of the evidence for improper purposes, including proof of bad character or propensity for crime"). In the present case, the military judge's generic spillover instruction did not relieve him of the responsibility to provide a specific instruction expressly tailored to the subject of propensity.

Prejudice under the plain error standard

Notwithstanding these errors, plain or otherwise, relief is not warranted under the third prong of the plain error test because the errors did not materially prejudice the substantial rights of Appellant. Although the military judge should have supplemented the standard spillover instruction with a specific instruction on propensity, the standard instruction provided the panel with some guidance on the impermissibility of using one charged offense as the basis for a finding of guilt on

the other charged offense. Likewise, trial counsel limited the potential effect of the improper argument by explicitly reminding the members that they could not use their determination of guilt on one offense to find guilt on the other. Finally, the context of the trial and the accumulation of distinct and clearly defined evidence of the crimes committed against Senior Airman DH, combined with the lack of defense objection to trial counsel's arguments and the members' finding that Appellant committed only consensual acts with SS, indicate that the improper statements of trial counsel did not have a significant impact on the members. Accordingly, I agree that the findings and sentence may be affirmed.

ERDMANN, Judge (concurring in part and dissenting in part):

I agree with the majority that trial counsel erroneously invited the members to compare the evidence presented on each offense to find propensity. Had the trial counsel desired to make that argument, he should have followed the procedural steps of Military Rule of Evidence (M.R.E.) 413(b). Had those procedural steps been followed, the military judge would have made the necessary threshold findings under M.R.E. 413[1] and

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[1] Those required findings are that: "(1) [t]he accused is charged with an offense of sexual assault" defined by M.R.E. 413(d); (2) "[t]he evidence proffered is 'evidence of the defendant's commission of another offense of . . . sexual assault'; and (3) [t]he evidence is relevant under [M.R.E.] 401 and [M.R.E.] 402." *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000) (quoting *United States v. Guardia*, 135 F.3d 1326, 1328 (10th

would have conducted an M.R.E. 403 balancing analysis. Because trial counsel did not comply with the steps for presenting or arguing propensity evidence, the military judge did not evaluate the evidence for admissibility as propensity evidence. Therefore, trial counsel erred by invoking propensity in his argument. I do not agree that the risks created by the improper argument were properly addressed by the spillover instruction. However, I need not determine whether trial counsel's error was a plain error requiring relief because I conclude that the military judge committed plain error by failing to provide a propensity instruction to the members.

Before closing arguments, the military judge's instructions to the members included a standard "spillover" instruction. Specifically, the military judge stated, "[I]f you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense." Despite this instruction, trial counsel urged the members in his closing argument to compare the offenses because "[i]t will also show you that he has [the] *propensity* to engage in this sort of conduct." (emphasis added). Trial counsel went on to urge that consideration of this propensity evidence would not conflict with the military judge's spillover instruction:

Cir. 1998) (requiring threshold findings before admitting evidence under M.R.E. 413); *see also United States v. Dewrell*, 55 M.J. 131, 138 n.4 (C.A.A.F. 2001).

> Now, before I get to [a comparison of the similarities between the two alleged sexual assaults] I want to preface– this was something the judge told you, I don't intend for you to take proof of one offense to find him guilty of another, the judge told you that you can't do that. But what you can do is you can take these things and compare them for his *propensity* to commit these types of offenses. That's perfectly acceptable when you're deliberating.

Emphasis added.

Not only was trial counsel's invitation to compare the offenses for propensity in direct conflict with the spillover instruction given by the military judge, he erroneously explained to the members that they could consider the propensity evidence despite the spillover instruction. The military judge should have corrected that conflict sua sponte by providing a propensity instruction.

Propensity evidence may be considered by the members to prove a charged substantive offense of sexual assault when the procedures of M.R.E. 413 have been followed. *See United States v. Schroder*, 65 M.J. 49, 52 (C.A.A.F. 2007). However, even when the procedures of M.R.E. 413 have been complied with, this court has further held that the procedural safeguards "required to protect the accused from unconstitutional application of M.R.E. 413 . . .

include the requirement of proper instructions." *Id.* at 55.

Without deciding whether the trial counsel's propensity argument constituted plain error, absent an instruction as to the proper consideration of propensity evidence, the members had no guidelines as to how to resolve the conflict between the military judge's instruction and trial counsel's argument that the instruction could be ignored in this situation.[2] The propensity instruction was necessary to prevent the members from convicting Burton on the basis of other than direct evidence of the charged offense and to preclude "relievfing] the government of its constitutional burden to prove every element of the charged offense beyond a reasonable doubt." *See id.*[3] Failure to instruct the members how they should properly consider propensity to commit sexual assault was, under the circumstances of this case, error that was plain and obvious.

In light of the fundamental, constitutional nature of this error, the Government has the burden of establishing that the error had "no causal effect

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[2] For an example of a propensity instruction, *see* Dep't of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch.7, para. 7-13-1, n.4 (2002).

[3] As this court said in *Schroder*, "[I]t is essential that . . . the members . . . be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone." *Id.* at 56.

upon the findings." *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007) (citing *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004); *United States v. Bins*, 43 M.J. 79, 86 (C.A.A.F. 1995)). The Government must demonstrate that there is no reasonable possibility that the lack of instruction contributed to the contested findings of guilty. *United States v. Kreutzer*, 61 M.J. 293, 300 (C.A.A.F. 2005). Because the members lacked any guidance in the evaluation of trial counsel's invitation to consider propensity, there is no assurance that the Government was held to its burden of proof or that Burton was convicted on direct evidence of the charged rape rather than upon the improper use of propensity derived from the other charged offense. The error was not harmless beyond a reasonable doubt.

I would reverse the decision of the United States Air Force Court of Criminal Appeals, set aside the findings and sentence, and authorize a rehearing.

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant LINDWOOD W. BURTON JR., United States Air Force

ACM 36296

July 16, 2007, Decided

NOTICE: NOT FOR PUBLICATION

DISPOSITION: AFFIRMED.

COUNSEL: For Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Anthony D. Ortiz, and Mary T. Hall, Esq.

For the United States: Colonel Gerald R. Bruce Colonel Gary F. Spencer Lieutenant Colonel Robert V. Combs Major Matthew S. Ward, and Major Carrie E. Wolf.

JUDGES: Before SCHOLZ, JACOBSON, and THOMPSON, Appellate Military Judges.

OPINION BY: THOMPSON

THOMPSON, Judge:

The appellant was tried at Yokota Air Base, Japan, by a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was found guilty of rape, indecent acts (as a lesser included offense of the charged indecent assault), and consensual sodomy (as a lesser included offense of the charged forcible sodomy) in violation of Articles 120, 134 and 125, UCMJ, 10 U.S.C. §§ 920, 934, 925. He was found not guilty of one specification of attempted rape. The court-martial sentenced the appellant to a dishonorable discharge, confinement for 8 years, and reduction to the grade of E-1. The convening authority disapproved the findings of guilty as to the offenses of indecent acts and consensual sodomy, and approved the sentence as adjudged, except for the term of confinement, which he reduced to 7 years.

On appeal, the appellant asserts six errors: (1) The military judge erred when he denied the defense motion to dismiss the rape charge because it was not properly investigated under Article 32, UCMJ, 10 U.S.C. § 832; (2) The evidence is legally and factually insufficient to support his conviction; (3) The trial counsel's findings argument was improper, in that he argued the appellant demonstrated a propensity to engage in sexual assault; (4) Assuming the trial counsel's findings argument was not improper, the military judge erred by failing to give an additional propensity instruction; (5) The military judge erred in permitting irrelevant matters in aggravation; and (6) The sentence is inappropriately severe. We have examined the record of trial, the assignments of error, and the government's response. We find that

the military judge did err with respect to the first issue, but conclude the error did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Background

The charges against the appellant arose from his alleged improper sexual conduct with two women: first, with SS while he was on leave in Venice, Italy, in September, 2000, and second, with Senior Airman (SrA) H, in Tachikawa City, Japan, in February, 2004.

On 19 July 2004, a single charge and specification of rape of then-SrA H was preferred. A pretrial investigation of that charge, pursuant to Article 32, UCMJ, was held on 23 July 2004. The appellant was represented by counsel at the Article 32, UCMJ, investigation and had the opportunity to cross-examine SrA H, who was present and testified at the hearing. The defense did not allege any defects in the investigation and the charge was referred to a general court-martial on 16 August 2004.

During its preparation for trial, the government discovered evidence of possible additional misconduct by the appellant against SS. On 26 September 2004, the government provided notice to admit a written statement alleging the appellant committed the uncharged acts against SS in 2000, and on 27 September 2004 notified the defense that they intended to call SS, the alleged former victim, to testify at trial. On 28 September 2004, the

appellant was arraigned in an Article 39(a) UCMJ, 10 U.S.C. § 839(a), session during which the defense submitted a motion to suppress the written statement and the testimony of the witness, based in part on lack of notice. The military judge declined to suppress the testimony based on lack of notice, but delayed the case until 15 November 2004 to allow the defense time to prepare.

On 8 November 2004, the charge alleging the rape of SrA H (the "original charge") was withdrawn and dismissed by the convening authority. On 10 November 2004, a charge of rape of SrA H was preferred; this charge is identical to the original charge except the appellant's unit was changed. Also on that date, three additional charges and specifications were preferred, alleging attempted rape, forcible sodomy and indecent assault of SS. In an undated memorandum, Lieutenant Colonel (Lt Col) T was appointed to investigate the charges and specifications pursuant to Article 32, UCMJ. On 12 November 2004 the trial defense counsel submitted a memorandum to Lt Col T, requesting that SS and SrA H appear at the hearing. The trial defense counsel noted that the government intended to rely on the earlier Article 32, UCMJ, hearing as to the original charge, but demanded further investigation pursuant to Rule for Courts-Martial (R.C.M.) 405(b). The trial defense counsel proffered that since the time of the original Article 32 investigation, SrA H had committed veracity offenses, gone absent without leave (AWOL), and was found to have fraudulently enlisted in the Air Force.

On 14 November 2004, Lt Col T was issued a new appointment letter, authorizing him to investigate the three new charges and specifications, but not the original charge. On 18 November 2004, Lt Col T completed his investigation, noting in his report that he did not further investigate the original rape charge, but he did attach a copy of the earlier Article 32, UCMJ, hearing report to his new report, which was forwarded to the convening authority. The trial defense counsel made a written objection to the 18 November 2004 investigation, noting among other things, that the original charge had not been reinvestigated. All four charges were referred to general court-martial on 30 December 2004. The trial defense counsel submitted a timely motion to dismiss, maintaining that because the original charge was dismissed, a new Article 32, UCMJ, investigation was required, and that the government's use of the prior investigation was covered by Article 32(c), UCMJ, which provided the appellant the right to further investigation. The military judge denied the motion to dismiss, finding that the re-preferred charge was identical to the original charge except for the appellant's unit, that the original charge was properly investigated, and thus no new investigation was required. He also determined that use of the previous investigation did not fall under R.C.M. 405(c), and therefore the appellant was not entitled to demand further investigation.

Investigation of the Charge

We review the military judge's denial of the

motion to dismiss for an abuse of discretion. *United States v. Davis*, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006). We consider first the military judge's conclusion that no new Article 32 investigation was required for the dismissed and re-preferred charge. Our superior court has stated that when charges have been withdrawn and dismissed, reinstituting the charges "requires the command to start over." *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988). "The charges must be re-preferred, investigated and referred in accordance with the Rules for Courts-Martial, as though there were no previous charges or proceedings." *Id.* In the present case the government did not completely start over. Instead, the officer investigating the new charges simply forwarded the previous Article 32, UCMJ, report, to the convening authority with no new recommendations. Thus the government did not fully comply with the requirements of Article 32. We also find the military judge erred when he determined that no further investigation was required by the provisions of Article 32(c), UCMJ, and R.C.M. 405(b). Those provisions state that where an investigation of an offense was conducted before an accused is charged, and that investigation provided the accused the rights to counsel, cross-examination, and presentation of evidence, no further investigation is required "unless it is demanded by the accused after he is informed of the charge." Article 32(c), UCMJ; R.C.M. 405(b).

We find that when the government relies on a previously completed Article 32, UCMJ, hearing to support re-referral of dismissed charges, with no

new recommendations by an investigating officer, the investigation is covered by Article 32(c), UCMJ, and an accused has the opportunity to demand further investigation. The military judge abused his discretion by not allowing for reinvestigation under Article 32, UCMJ. The appellant contends that the appropriate remedy is to set aside the findings and sentence. We decline to do so. The requirements for pretrial investigations are binding "but failure to follow them does not constitute jurisdictional error." Article 32(e), UCMJ. An error in the Article 32, UCMJ, investigation process is not a "structural error subject to reversal without testing for prejudice." *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Article 59(a), UCMJ, states: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." On appeal we evaluate errors in Article 32, UCMJ, proceedings under Article 59(a), UCMJ. *Davis*, 64 M.J. at 449.

We test for material prejudice using the harmless beyond a reasonable doubt standard. *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). The appropriate inquiry is "whether, beyond a reasonable doubt, the error did not contribute to the [appellant's] conviction or sentence." *Id.* (citing *United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993)).

As noted above, the appellant wanted to cross-

examine the victim, SrA H, on unspecified veracity offenses, her AWOL, and evidence that she fraudulently enlisted in the Air Force by concealing drug use. This information was, however, provided to the convening authority before he referred the rape charge to a general court-martial. In addition to having the report from the original Article 32, UCMJ, investigation, the convening authority received pretrial advice concerning the rape charge in accordance with Article 34, UCMJ. In his pretrial advice to the convening authority, the staff judge advocate (SJA) commented on SrA H's credibility, noting that she had been given a letter of reprimand for two violations of AWOL, and that she made a false official statement in her response to the letter of reprimand. The SJA also informed the convening authority of the trial defense counsel's assertion that SrA H had used marijuana before joining the Air Force.

SrA H appeared at trial and testified. The trial defense counsel conducted a thorough cross-examination, among other things drawing admissions from SrA H that she lied about her pre-service drug use and made false statements to her superiors. We find there is no evidence that the trial defense counsel's pretrial preparation was hampered because of defects in the pretrial investigation. In light of the detailed cross-examination of SrA H conducted at trial, we find that the error in this case was not a factor in obtaining the appellant's conviction. We conclude that the military judge's refusal to dismiss the affected charge for reinvestigation was harmless beyond a reasonable

doubt.

Factual and Legal Sufficiency

The appellant next argues that the evidence presented at trial was legally and factually insufficient to support his conviction for rape. We disagree. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The crux of the appellant's argument is that he is not guilty because SrA H lacked credibility, that she had a motive to fabricate, that her actions were inconsistent with someone who had been raped, and that the physical actions she described were improbable. We find the appellant's arguments unpersuasive. The evidence in this case, viewed in a light most favorable to the prosecution, provides a sufficient basis from which a rational trier of fact could have found all of the elements of rape beyond a reasonable doubt. Further, after considering all of the evidence in the record of trial and making

allowances for not having personally observed the witnesses, we ourselves are convinced beyond a reasonable doubt that the appellant committed the offense. Therefore, his conviction is legally and factually sufficient. *See Turner*, 25 M.J. at 324-25.

Trial Counsel Argument

Next, the appellant asserts that, during his findings argument, the trial counsel improperly argued that the appellant demonstrated a propensity to engage in sexual assault. Specifically, the appellant contests the portion of the trial counsel's argument urging the members to compare the testimony from both of the alleged victims, and to use that testimony to examine the appellant's method of operation and his propensity to engage in sexual assault.

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. Failure to object to improper argument constitutes waiver. R.C.M. 919(c). In the absence of an objection, we review for plain error. *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004). Plain error occurs when: (1) there is an error; (2) the error is plain or obvious; and (3) the error results in material prejudice to a substantial right of the appellant. *Id.* At 88-89 (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

In the case *sub judice*, the trial defense counsel did not object to the trial counsel's argument and

thus we apply a plain error analysis to determine whether relief should be granted. While arguments that an accused has a propensity to commit an offense are generally prohibited, an exception has been made in the case of sexual assault. Under Mil. R. Evid. 413, other acts of sexual assault may be introduced for expansive purposes, including propensity. While Mil. R. Evid. 413 most often deals with prior sexual acts not charged in the ongoing proceedings, it is useful to analyze the present case in terms of Mil. R. Evid. 413. *See, e.g., United States v. Myers*, 51 M.J. 570 (N.M. Ct. Crim. App 1999). Where trial counsel's argument regarding propensity could have been made pursuant to Mil. R. Evid. 413 with uncharged prior sex acts, we find it is not plain error to make the same arguments when the prior sex acts are charged offenses.

We further find that the trial counsel's argument did not result in any material prejudice to the rights of the appellant. The trial counsel's argument spans 16 pages in the record of trial. During the course of the argument the trial counsel used the word "propensity" only twice, and while doing so he informed the members "I don't intend for you to take proof of one offense to find him guilty of another . . . ." We consider the argument of a trial counsel in context, and not in isolation. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). Viewed in context of the entire court-martial, we are convinced beyond a reasonable doubt that the trial counsel's comments did not prejudice a substantial right of the appellant.

Instructions from the Military Judge

The appellant avers that the military judge erred by failing to give an additional propensity instruction, based on the trial counsel's argument. In his instructions the military judge included a standard spillover instruction:

> Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof on one offense carries with it no inference that the accused is guilty of any other offense.

The trial defense counsel did not object to the spillover instruction, and did not request a further propensity instruction.

The question of whether the members were properly instructed is a matter of law we review de novo. *United States v. Green,* 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005), (citing *United States v. Maxwell,* 45 M.J. 406, 424 (C.A.A.F. 1996)). A failure to object to an instruction prior to commencement of deliberations waives the objection absent plain error. R.C.M. 920(f); *United States v. Simpson,* 56 M.J.

462, 465 (C.A.A.F. 2002). In the present case we find the military judge's instruction was sufficient to inform the members how they should view the evidence. Even assuming, *arguendo*, that the military judge should also have given further instructions specifically mentioning propensity, his failure to do so did not result in material prejudice to a substantial right of the appellant.

Although charged with attempted rape, forcible sodomy, and indecent assault against SS, the members found him guilty only of consensual sodomy and indecent acts. This suggests that the members were not unduly swayed to convict the appellant by the military judge's failure to provide a specific propensity instruction. *See, e.g., United States v. Schroder*, 65 M.J. 49 (C.A.A.F. 2007). Based on the totality of the evidence, the member's findings, and the spillover instruction given the members by the military judge, we are convinced beyond a reasonable doubt that the lack of a specific propensity instruction did not contribute to the appellant's conviction. *Kreutzer*, 61 M.J. at 298.

Sentencing Evidence

The appellant next argues that the military judge erred when he allowed SS to testify during sentencing. Over trial defense counsel's objection, SS testified during presentencing that she lost her self confidence, considered suicide, became easily hysterical, could not develop or maintain relationships, and could not go anywhere alone

anymore. The appellant maintains that because the members found there was insufficient evidence to conclude the appellant forced SS to engage in sodomy or the indecent acts, her comments should have been restricted to any effects caused by her having consensual sex with the appellant.

The standard of review on appeal for the admission or exclusion of evidence on sentencing is whether the military judge clearly abused his discretion. *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999). R.C.M. 1001(b)(4) permits a trial counsel to present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of social, psychological, and medical impact or cost to any person who was the victim of an offense committed by the accused. Whether or not a circumstance is directly related to or results from the offenses calls for considered judgment by the military judge, and is not to be overturned lightly. *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997) (citing *United States v. Jones*, 44 M.J. 103, 104-05 (C.A.A.F. 1996)). We hold that the military judge in the present case did not abuse his discretion in permitting SS to testify as to proper matters in aggravation. R.C.M.1001(b)(4).

Sentence Appropriateness

This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should

be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In conducting our review we must keep in mind that Article 66(c), UCMJ, has a sentence appropriateness provision that is "a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citing *United States v. Bauerbach*, 55 M.J. 501, 506 (A.C.C.A. 2001)). Article 66(c), UCMJ, "requires that [we] independently determine, in every case within [our] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [we] affirm." *Baier*, 60 M.J. at 384-85.

We may also take into account disparities between sentences for similar offenses. Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

After carefully examining the submissions of counsel and taking into account all the facts and circumstances, we do not find the appellant's

sentence inappropriately severe. *See Snelling*, 14 M.J. at 268-69. To the contrary, after reviewing the entire record, we find the sentence is appropriate for this offender and his offenses. *See Baier*, 60 M.J. at 383-84; *Healy*, 26 M.J. at 395.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

FED. R. EVID. 413 provides the following, in part:

> (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing of any matter to which it is relevant.
>
> (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

FED. R. EVID. 414 provides the following, in part:

> (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
>
> (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

MIL. R. EVID. 401 provides the following:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MIL. R. EVID. 402 states the following:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

MIL. R. EVID. 403 provides the following:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MIL. R. EVID. 404 states the following, in relevant part:

> (a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under MIL. R. EVID. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution;
>
> (2) Evidence of a pertinent trait of character of the alleged victim of the crime offered by the accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or assault case to rebut evidence that the alleged victim was an aggressor.

MIL. R. EVID. 413 provides the following, in part:

> (a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> (b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

MIL. R. EVID. 414 provides the following, in part:

> (a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> (b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.